Supreme Court, U.S.
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No. 01-1185

In The

Supreme Court of the United States

SPIRIT LAKE TRIBE,

Petitioner,

vs.

STATE OF NORTH DAKOTA, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE STATE OF NORTH DAKOTA IN OPPOSITION

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QUESTIONS PRESENTED

Devils Lake adjoins the northern boundary of the Spirit Lake Indian Reservation. North Dakota and the United States have always treated the lake and its relicted lands as outside of the reservation and any one of numerous activities throughout the 1900s by non-Indians and state and federal officials notified the tribe of adverse claims to the lake. The long delay in bringing suit implicates the federal quiet title act's 12-year statute of limitations. To avoid it, the tribe relies on an internal, 1976 memo by a Department of Interior employee expressing his view that the lake is within the reservation. The memo, the tribe asserts, eliminated decades of adverse claims and gave the tribe a new 12-year statute of limitations. The questions presented are:

1. Did the Court of Appeals correctly rule that it was unreasonable for the tribe to rely on the 1976 memo to believe that the United States was adopting a new policy of holding the lake in trust for the tribe?

2. Did the Court of Appeals allow the executive branch to improperly infringe on a Congressional prerogative to control title to tribal land even though the Court of Appeals made no ruling on title or on reservation boundaries but only affirmed dismissal on jurisdictional grounds?

3. Did the Court of Appeals review the District Court's decision to dismiss under the proper standard of review?

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STATEMENT OF THE CASE

1. *History of the litigation.* In 1986 the Spirit Lake Tribe filed suit seeking rulings that Devils Lake is within the reservation created by the tribe's 1867 treaty and that the United States holds title to the lakebed in trust for the tribe. The defendants contend that the treaty excludes Devils Lake from the reservation. Furthermore, the United States asserts fee title to part of the lakebed under a state deed. In 1971 the state conveyed 62,000 acres of the lake to the United States to partially satisfy the state's obligation under a state/federal water project. Cert. Pet. at F-1. The state was able to make the conveyance because, it asserts, it held title to the lake under the equal footing doctrine, a doctrine that provides states with title to the beds of navigable waters.

The tribe's claim to the lake is to an elevation of 1,439 feet. St. Appx. at 79.[1] Throughout much of the 1900s the lake was far below that mark, exposing thousands of lakebed acres. Non-Indian landowners used the dry lakebed for numerous agricultural purposes. These defendants assert that as riparian landowners they owned the lakebed as a riparian right.

The United States' 1988 motion to dismiss raised several defenses. One concerned the tribe's 1951 Indian Claims Commission petition seeking compensation for land outside of the 1867 reservation. *Devils Lake Sioux Tribe v. North Dakota,* 714 F.Supp. 1019 (D. N.D. 1989). The claim was settled in 1977. The United States argued

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[1] References in this brief to "St. Appx." are to the appendix filed by the state with the Court of Appeals.

that the settlement included compensation for Devils Lake and having been paid for the lake once the tribe couldn't sue for it again. The District Court agreed and dismissed the suit. *Id.* at 1026.

The Court of Appeals reversed. It ruled that whether the 1977 settlement included the lake "requires further [factual] development." *Devils Lake Sioux Tribe v. North Dakota,* 917 F.2d 1049, 1056 (8th Cir. 1990); Cert. Pet. at C-18. After remand the United States decided not to seek an evidentiary hearing on the 1977 settlement. It thought that the alternative arguments it had raised in 1988, but weren't decided, had merit.

Thus, the United States' 1999 motion argued that the quiet title act's 12-year statute of limitation, 28 U.S.C. § 2409a(g), barred the suit. It also argued that the tribe in its 1951 Indian Claims Commission action could have sued for Devils Lake but didn't and, therefore, claim preclusion applied. The District Court agreed with both arguments. Cert. Pet at B-15-17. It dismissed the United States. It also recognized the United States is an indispensable party and dismissed all the other defendants. *Id.* at B-17-20.

2. *A century of non-Indian adverse uses.* The Spirit Lake Tribe states that "[f]or many years" the state and tribe have disputed title to Devils Lake. *Id.* at 4-5. This is untrue. Since statehood North Dakota, as well as the United States, have treated the lake as if it were not in the Spirit Lake Indian Reservation and for most of that time the tribe acquiesced. Not until the 1980s did the tribe assert an interest in the lake. The many years of adverse uses to which the lake and lakebed were put by North

Dakota, the United States, and non-Indian entities and individuals occurred without tribal objection.

The 1971 conveyance of the lakebed from North Dakota to the United States was only one instance that created a cloud on the tribe's interest and gave it notice that the United States was not holding the lake in trust for the tribe. Many other activities on the lake and lakebed carried out over nearly 100 years by non-Indian individuals, entities, and governments notified the tribe of adverse interests. The District Court stated that there is an "enormous amount of evidence" in this case. Transcript of Jan. 6, 2000, Proceedings at 12. Almost all of it was presented by the United States and the state to prove that the tribe had notice again and again of adverse claims to Devils Lake and that its 12-year statute of limitations expired decades before it filed suit. The District Court discussed portions of this evidence. *Id.* at B-9-15.

Some of it includes 1973 tribal documents showing knowledge of the reservation boundary question more than 12 years before the tribe's 1986 suit. St. Appx. 25-28. Many government maps depict the lake outside the reservation. *Id.* at 30-44. Some of these were exhibits in prior litigation involving the tribe and so the tribe saw them. *Id.* at 43-44. An example is the second map at the end of Section B in the Appendix to the tribe's petition. Also, a 1970 tribal resolution states that General Land Office maps "define[ ]" the reservation, *id.* at 23, and these maps depict the lake outside the reservation. *Id.* at 32-33, 35.

Government writings describe the lake as outside the reservation. *Id.* at 46-56. The tribe saw some of these. For

example, 1923 and 1971 decisions in cases involving the tribe describe the reservation as excluding the lake. *Id.* at 46-48. A 1971 Regional Solicitor's opinion given to the tribal chairman also gave the tribe notice. *Id.* at 50-53.

The federal government adversely used islands. *Id.* at 260, 265-91; Cert. Pet. at B-10. It adversely used the lakebed as a wildlife refuge and cut drainage ditches in and fenced, patrolled, and farmed the dry lakebed. St. Appx. at 149-52, 321-23. State agencies have historically exercised regulatory jurisdiction over the lake, thereby giving the tribe notice of adverse claims. *Id.* at 112, 162-65, 244-53. There is nothing in the record to indicate that the tribe ever asserted any kind of jurisdiction over the lake. Indeed, the record is otherwise. *E.g., id.* at 102 ¶ 16; 258 ¶ 4.

The United States issued 153 patents covering nearly 6,000 lakebed acres now claimed by the tribe, *id.* at 62, 72-76, further giving the tribe notice the government wasn't ~~holding~~ the land for the tribe. Cert. Pet. at B-9. Activities by non-Indian individuals and governments on the lakebed during dry periods of the 1900s gave the tribe notice that there was a question with its interest in land it now claims. These activities include such agricultural activities as planting and harvesting small grains, pasturing livestock, building fences, digging waterwells, and making trails. Other activities involve construction of roads and utilities, gravel mining operations, and an array of military uses by the National Guard. St. Appx. at 99-145, 153-65, 242-47. The tribe stood by while private parties litigated quiet title actions to lakebed property. *Id.* at 166-238. *See also Rutten v. State*, 93 N.W.2d 796 (N.D.

1958) (action seeking to stop the state from building a project to raise the level of Devils Lake).

Such instances culminate in 1965 and 1970 resolutions of the Spirit Lake Tribe's governing council stating that the reservation's northern boundary is the *south* side of the lake. St. Appx. at 21-24. The resolutions state that "the south side of Devils Lake . . . forms the north boundary of the reservation." *Id.* Thus, the tribe's statement that "[f]or many years" the state and tribe disputed the location of the reservation's northern boundary, Cert. Pet. at 4-5, is untrue. For many years there was no disagreement. The state and the federal government considered the lake outside of the reservation and the tribe not only acquiesced without objection to the adverse uses, but also acknowledged in tribal resolutions that the lake was not within the reservation. Not until this litigation was there a tribal/state dispute.

3. *The 1976 memo and the statute of limitations.* The tribe, to avoid its statute of limitations problem in light of decades of adverse uses, relies on a 1976 memo. That year a Department of Interior associate solicitor asked another associate solicitor, Reid Chambers, for his opinion on title to Devils Lake. Cert. Pet. at E-1. Chambers' reply memo stated that in his opinion the lake was within the reservation. *Id.*

Even though Chambers' memo was never published or formally issued, the tribe learned about it. The tribe asserts that the memo allowed it to believe that the government made an about-face in policy and was now holding Devils Lake in trust for the tribe. It permitted, the tribe asserts, the tribe to believe that the United States

had abandoned its adverse claims to and interests in the lake. If so, the tribe believes that this allowed a new 12-year period to begin to run in the event that the United States would ever again assert an adverse claim. This occurred, the tribe says, in 1981 when another internal Department of Interior memo disavowed Chambers' 1976 memo. Thus, argues the tribe, its 1986 suit is timely.

ARGUMENT

I. The Court of Appeals did not reject Ninth Circuit jurisprudence, but cited and relied on it. While the Court reached a different result than in the Ninth Circuit's *Michel* decision, it did so because the facts here are different, preventing the Court of Appeals from finding that a new limitations period was set in motion.

The Ninth Circuit holds that when the United States abandons an adverse property claim the statute of limitations stops running and begins anew should the government reassert its claim. *Michel v. United States*, 65 F.3d 130, 132 (9th Cir. 1995); *Schultz v. Department of Army*, 886 F.2d 1157, 1161 (9th Cir. 1989) (dicta). The Court of Appeals did not, as the tribe asserts, Cert. Pet. at 15-16, reject this Ninth Circuit law.

Indeed, in addressing how to apply the quiet title act's statute of limitations the Court of Appeals stated: "We have little disagreement with the Tribe's presentation of the governing legal framework." *Id.* at A-10. It specifically stated, paraphrasing *Michel*, that when the United States abandons but later reasserts an adverse property claim, "a new 12-year period begins in which a

plaintiff may file his QTA action against the government." *Id.* It cited *Michel* as authority for this proposition. *Id.* Thus, the Court of Appeals expressly accepted the Ninth Circuit's interpretation of the quiet title act's statute of limitations, that is, that events could set in motion a new limitations period.

The Court of Appeals, however, had some doubts whether a federal official such as Associate Solicitor Reid Chambers, the author of the 1976 memo, had sufficient authority to abandon a federal property claim and thereby allow a new limitations period to begin. *Id.* at A-12-14. On this point – identifying federal officials with authority to actually create the possibility of a new limitations period – there may be a difference between the Ninth Circuit and the Court of Appeals. But even so, any such difference is without practical consequences for this case.

The Court of Appeals examined the issue in two ways. In one it did just what the tribe said it didn't do, something the tribe doesn't mention in its petition. The Court stated that "[e]ven if" it agreed with "the Tribe's argument that Chambers possessed the authority to bind the government," his 1976 memo didn't do so. *Id.* at A-15. The Court of Appeals scrutinized the memo and concluded that the tribe could not have reasonably relied on it. *Id.* at A-12-18.

The memo was but an "intra-office" memo from one federal employee to another. *Id.* at A-17. While the tribe describes the memo as "thoroughly considered," *id.* at 5, the Court of Appeals stated that "[w]e have cause to doubt that Chambers was well-informed about the Devils

Lake ownership controversy." *Id.* at A-16 n.4. The Court added that the memo expressed, not the government's position, but merely Chambers' "personal opinion." *Id.* at A-16. The memo was never formally issued. *Id.* Finally, the Court of Appeals noted that the government's failure to actually do anything to manifest acceptance of the memo was relevant to evaluating its reliability and significance. *Id.* at A-17-18.

Thus, in this part of its ruling the Court of Appeals did exactly what the tribe says it should have done. It assumed Chambers could abandon the government's claim, but concluded that it was unreasonable to view his memo as doing so. *Id.* at A-15. It reiterated this. "[I]t had never been reasonable to rely on Chambers's memo . . . . " *Id.* at A-20. "[R]eliance upon Chambers's memo . . . was wholly unreasonable . . . . " *Id.* at A-21. "Chambers' memo *did not* abandon the government's interest in Devils Lake." *Id.* at A-20. Upon an evaluation of the factual record, the Court of Appeals concluded that the memo did not mark a change in longstanding United States policy and did not establish the opportunity for a new 12-year statute of limitations. The tribe doesn't like this conclusion, but it isn't inconsistent with Ninth Circuit precedent.

Furthermore, the tribe never in fact relied on the memo despite what it says today. Tribal records from throughout the 1970s show that the tribe was aware of a question about the location of its reservation's northern boundary. St. Appx. at 25-28, 381-404. For example, 1977 tribal council minutes refer to studying "the Tribe's claim to the ownership of Devils Lake," and planning "how to proceed with the Tribes [sic] claim." *Id.* at 389. Tribal

council records from 1978 state that the tribe was "gearing up" to "initiate action on the Lake." *Id.* at 392. These and other events occurred shortly after 1976, the year the tribe states that it relied on the 1976 memo to believe all was well with its "interest" in the lake.

In sum, while the Court of Appeals reached a different result than in *Michel*, it didn't do so because it rejected Ninth Circuit law. It reached a different result because of different facts. *Michel* involved a land access dispute between the Michels and the government. Twice during the dispute the government, in written communications to the Michels, expressly acknowledged the Michels' right of access. *Michel*, 65 F.3d at 133. The facts in *Michel* differ from the internal memo on which the Spirit Lake Tribe asserts that it relied.[2] The Court of Appeals evaluated the memo and found that relying on it was unreasonable. Furthermore, the record reveals that the tribe did not in fact rely on it.

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[2] The tribe also cites the Ninth Circuit's decision in *Schultz*. In dicta *Schultz* stated that a federal action could lead to a new statute of limitations. *Schultz*, 886 F.2d at 1160-61. But in neither of its *Schultz* opinions did the Ninth Circuit actually apply a new statute of limitations. *Schultz v. Department of Army*, 96 F.3d 1222 (9th Cir. 1996); *Schultz v. Department of Army*, 886 F.2d 1157 (9th Cir. 1989).

II. The Court of Appeals neither decided title nor defined the reservation boundary. It decided only that there was enough evidence to have put the tribe on notice of adverse claims and that the tribe's suit was untimely. Therefore, it did nothing to infringe on Congressional control over Indian land.

The tribe cites decisions holding that "only Congress can abandon the federal [property] claim;" that " '[n]o appropriation of public land can be made for any purpose, but by authority of congress;' " and that "Congress must specifically authorize the taking of Indian trust land." Cert. Pet. at 9. But the Court of Appeals did not rule that federal property was either abandoned or appropriated or that Indian land had been taken. The tribe also states that the "Constitution prohibits federal executive branch officers from disclaiming the federal interest which Congress asserts through a validly enacted federal law." *Id.* But the Court of Appeals did not rule that a federal employee could disclaim, transfer, or abandon a federal interest established by Congress.

What the Court of Appeals did was rule that the Bureau of Reclamation's acceptance of the 1971 state deed put a cloud on the tribe's interest and triggered the statute of limitations. It didn't make any rulings on title. It stated that "ownership of Devils Lake remains an open question." *Id.* at A-25. It added that " 'dismissal . . . does not quiet title to the property in the United States. The title dispute remains unresolved. Nothing prevents the claimant from continuing to assert [its] title . . . . ' " *Id.* (quoting *Block v. North Dakota*, 461 U.S. 273, 291-92 (1983)).

The Court of Appeals addressed only jurisdiction. It didn't rule on title, reservation boundaries, or lake ownership. It didn't rule that a federal employee could disclaim or abandon federal or tribal land, or transfer federal trust land into federal fee land contrary to Congressional wishes. It didn't rule on the validity of the 1971 state deed. All that the Court did was identify and discuss an incident, the 1971 deed to the United States, that it considered sufficient to trigger the statute of limitations. Thus, the Court of Appeals did not, as the tribe states, "directly contradict" Supreme Court holdings "that subordinate officers of the United States cannot disclaim land which Congress has claimed." Cert. Pet. at 15.

The tribe chides the state and government for not citing case law supporting the view that federal officials, without Congressional authorization, can change reservation boundaries. Cert. Pet. at 12. No one at this stage is arguing reservation boundaries. The parties and Court of Appeals addressed only jurisdiction.

The tribe also asserts that the origin of any possible state title to Devils Lake must be granted by Congress. *Id.* This is untrue. To allow states to enter the Union on an "equal footing" with the original states

> the default rule is that title to land under navigable waters passes from the United States to a newly admitted State. . . . Specifically . . . '[a] court deciding a question of title to the bed of navigable water must . . . begin with a strong presumption' against defeat of a State's title.

Idaho v. United States, 533 U.S. 262, ___, 121 S.Ct. 2135, 2142 (2001) (citations omitted). And Devils Lake is navigable. Cert. Pet. B-5.

In sum, the Court of Appeals did nothing inconsistent with Supreme Court decisions on Congressional approval of Indian land conveyances. It did nothing inconsistent because it didn't rule on title. "[O]wnership of Devils Lake remains on open question." *Id.* at A-25. The Court of Appeals only ruled on notice under the quiet title act and in doing so didn't improperly intrude on Congressional prerogatives over land titles.

III. The Court of Appeals reviewed and affirmed the District Court's dismissal under proper standards of appellate review.

The tribe states that while the standard of review used by the Court of Appeals is not contrary to any "direct holding" of the Supreme Court, it is "contrary to the explicit rationale for this Court's decisions in *Harlow*, *Siegert*, and *Mitchell*." Cert. Pet. at 21. These cases do not discuss or even concern the appellate standard of review. They address the substantive immunity of federal officials and briefly comment on how district courts should proceed when an immunity defense is raised. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (considering the immunity of Presidential aides); *Siegert v. Gilley*, 500 U.S. 226 (1991) (clarifying the analysis to use when addressing immunity of federal employees); *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (considering the absolute immunity of the Attorney General). The Court of Appeals did nothing

inconsistent with the holdings or spirit of *Harlow*, *Siegert*, and *Mitchell*.

The tribe goes on to state that the Court of Appeals' decision is inconsistent with decisions in other Circuits and cites primarily Fifth Circuit cases for what it believes is the proper standard of review. Cert. Pet. at 22-23. In cases with undisputed facts, the tribe, quoting a Fifth Circuit case, states that " 'review is limited to determining whether the district court's application of the law is correct and whether the facts are indeed undisputed.' " *Id.* at 22 (quoting *Ynclan v. Department of Air Force*, 943 F.2d 1388, 1390 (5th Cir. 1991)).

But this is the same standard in the Eighth Circuit, which has stated: "[T]he appellate court's review is 'limited to determining whether the district court's application of the law is correct and, if the decision is based on undisputed facts, whether the facts are indeed undisputed.' " *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990). *Osborn* even quotes, for this proposition, a *Fifth Circuit* decision, *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir, 1981). Thus, there is no conflict between the Eighth and Fifth Circuits, and *Osborn* is not an anomaly in the Eighth Circuit. Its ruling on the standard of review is often cited. *E.g.*, *Trimble v. Asarco, Inc.*, 232 F.3d 946, 959-60 (8th Cir. 2000); *Appley Brothers v. United States*, 164 F.3d 1164, 1170 (8th Cir. 1999). It has even been relied on by the Eighth Circuit after the decision that the tribe is asking the Court to review. *Minnesota Association of Nurse Anesthetists v. Allina Health System Corp*, 276 F.3d 1032, 1040 (8th Cir. 2002).

Even though the Court of Appeals did not make any express statements inconsistent with this case law or the Fifth Circuit, the tribe points to a handful of specific matters that it believes expose the Court's application of an improper scope of review. It criticizes the Court's statement that " 'the Tribe is not entitled to the benefit of every favorable inference because, strictly speaking, we are not reviewing the propriety of summary judgment.' " *Id.* at 20. The tribe asserts that the case is indeed a summary judgment case. *Id.* But even summary judgment doesn't entitle the tribe to the benefit of *all* favorable inferences, only "justifiable" inferences. *Anderson v. Liberty Lobby, Inc.*, 477 U.S 242, 255 (1986).

Furthermore, the Court of Appeals, when it briefly discussed the standard of review, made an alternative ruling that the tribe doesn't mention. It stated that "[e]ven if we credited all the Tribe's arguments and inferences about the 1976 and 1981 memos, we could not conclude (as a legal matter) that the QTA statute of limitations stopped." Cert. Pet. at A-21. The statute of limitations begins to run when a plaintiff should have known about a cloud on his title. *Id.* The "inescapable corollary" to this is that the limitations period "does not stop when government action simply compounds a pre-existing cloud on title." *Id.* The Court concluded: "Viewing the Tribe's position charitably, the 1976 and 1981 memos did no more than confirm the '1971 cloud' that already existed on the Tribe's putative title to Devils Lake." *Id.* In other words, even if the Court had applied what the tribe thinks is the proper standard of review, the Court's view of the 1976 and 1981 memos wouldn't change.

The tribe states that "without proof" the Court held that the tribe knew about the state's 1971 deed to the United States. *Id.* at 24. But the Court gave several reasons why it found that the tribe was aware of the deed. It stated, for example, that the conveyance "was widely reported by local media outlets . . . and by larger organizations." *Id.* at A-8. Furthermore, a federal document given the tribe in 1973 mentions the deed. St. Appx. 324-27.

The tribe adds that it was "[c]ontrary to reasonable inferences" for the Court to hold that the 1971 deed provided the tribe with notice of an adverse claim. Cert. Pet. at 24. Interpreting evidence and evaluating the significance of certain facts will often lead to different opinions but that doesn't mean that an improper standard of review was used. Furthermore, the tribe's actual knowledge of the adverse claim was unnecessary. The statute of limitations begins to run when a claimant "knew or should have known" about the United States' claim. 28 U.S.C. § 2409a(g). " 'All that is necessary is a reasonable awareness that the Government claims some interest adverse to the plaintiff's.' " *North Dakota v. Block*, 789 F.2d 1308, 1313 (8th Cir. 1986). Neither " '[k]nowledge of the claim's full contours' " nor a "clear and unambiguous claim" is required. *Id.* "[O]ne uncontroverted instance of notice suffices . . . . " *Nevada v. United States*, 731 F.2d 633, 635 (9th Cir. 1984). A claim creating just a "cloud" triggers the statute. *Knapp v. United States*, 636 F.2d 279, 282 (10th Cir. 1980).

Even if the 1971 deed did not give the tribe notice, it was just one of many events in the record proving notice. Some of these were discussed above in the Statement of

the Case, and the Court of Appeals noted them. Cert. Pet. A-8 n.2. It didn't discuss them, probably because the evidence is cumulative, the 1971 deed is a recent event, and just one instance of notice will trigger the statute of limitations.

The tribe also states that the Court of Appeals applied an improper standard of review by failing to hold that the 1981 Department of Interior memo didn't support the tribe's interpretation of and reliance on Chambers' 1976 memo. *Id.* at 25. The Court stated that this bootstrap argument was "plainly specious" and reiterated that "it had never been reasonable to rely on Chambers's memo in the first place." *Id.* at A-20.

The tribe complains that the Court did an about-face on the 1976 memo, that is, that its view of the memo is different from that expressed in the Court's 1990 decision in this dispute. *Id.* at 25. The Court fully explained itself on this point. *Id.* at A-19-20. The tribe states that the Court concluded without any supporting evidence that Chambers didn't have authority to issue an opinion on title to Devils Lake. *Id.* at 25. But the Court cited two sources, a solicitor's opinion and an affidavit submitted by the United States. *Id.* at A-13. The tribe states that the tribe and the United States relied on 1976 memo because it was referenced in some later litigation. *Id.* at 26. The Court noted that that litigation was "unrelated" and the statements relied on by the tribe are equivocal. *Id.* at A-19-20 n.5.

In none of the instances cited by the tribe as improper evaluation of the record, is there a dispute over the substantive facts. No one, for example, argues that

the 1971 deed and Chambers' 1976 memo don't exist. And no one disputes their contents. There is no controversy over the historical facts submitted to the lower courts and upon which they considered whether the tribe had notice sufficient to trigger the statute of limitations. There is, of course, disagreement between the parties – and now between the tribe and the Courts – as to the meaning and significance of these facts. But disputed facts were not presented to the District Court or the Court of Appeals and despite what the tribe asserts, the Court of Appeals didn't embark on a fact-finding tour of the record. Indeed, it specifically noted: "We do not mean to suggest that we are presently engaged in fact-finding." *Id.* at A-20.

In sum, the Court of Appeals, in reviewing the record, did nothing inconsistent with Supreme Court and Fifth Circuit decisions. It didn't engage in resolving disputed questions of fact. It reviewed the factual record and considered the relevance and significance of the undisputed facts; something much different than making findings of fact. After reviewing the record the Court of Appeals agreed with the District Court that the tribe had notice of adverse claims more than 12 years before it sued and that its case is time-barred.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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